U.S. Department of Justice

Consumer Protection Branch
P.O. Box 386
Washington, D.C. 20044-0386
Telephone: (202) 532-4892

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Filed Electronically

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Supplemental Notice of *Ex Parte* Presentation, U.S. Department of Justice, CG Docket No. 11-50, DISH Network, LLC Petition for Declaratory Ruling Concerning The Telephone Consumer Protection Act (TCPA)

Dear Ms. Dortch:

This letter supplements the *ex parte* notice submitted by the U.S. Department of Justice ("DOJ") on October 25, 2011, in order to provide greater detail regarding the discussion at DOJ's October 20, 2011 meeting with representatives of the Federal Communications Commission ("FCC"). The DOJ attendees at the meeting included Acting Deputy Assistant Attorney General for the Consumer Protection Branch Maame Ewusi-Mensah Frimpong, Consumer Protection Branch Director Michael Blume, Consumer Protection Branch Deputy Director Kenneth Jost, and Consumer Protection Branch trial attorneys Lisa Hsiao, Sang Lee, and Patrick Runkle. The FCC attendees were Sherrese Smith, Legal Advisor to Chairman Genachowski, William Freedman and Kurt Schroeder of the Consumer & Governmental Affairs Bureau, and Laurence Bourne and Jacob Lewis of the Office of General Counsel.

1. FCC Should Interpret the TCPA as Holding a Seller Primarily Liable for Calls Made on its Behalf

DOJ first explained that the FCC should interpret the TCPA to impose primary liability on a seller for illegal telemarketing calls made *on its behalf* by outside sales entities. The TCPA contemplates liability for anybody who stands to benefit from the illegal telemarketing, including the telemarketer who made the call, as well as the seller whose products and services are being marketed. DOJ noted that, contrary to the position advanced by DISH Network LLC ("DISH") and other commentators, the TCPA's language does not require a formal "agency" relationship between the seller and the outside telemarketer to hold the seller liable. Such a reading of the law would conflict with FCC's prior ruling that the entity on whose behalf the illegal call was made is ultimately liable, and with the cases following this ruling. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 F.C.C.R. 12391, 12407 (1995) ("1995 Order"); *see, e.g, Bridgeview Healthcare Ctr. Ltd. v. Clark,* Case No. 09-

CV-05601, 2011 U.S. Dist. LEXIS 112698 (Sept. 30, 2011); *Spillman v. Dominos Pizza, LLC,* Case No. 10-349-BAJ-SCR, 2011 U.S. Dist. LEXIS 17177 (M.D. La. Feb. 21, 2011); *Glen Ellyn Pharmacy v. Promius Pharma,* Case No. 09 C 2116, *LLC,* 2009 U.S. Dist. LEXIS 83073 (N.D. Ill. Sept. 11, 2009); *Worsham v. Nationwide Ins. Co.*, 777 A.2d 868 (Md. App. 2001). *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. App. 2000).

DOJ also discussed how the primary liability approach permits all aspects of the TCPA, and all references to "initiate," to be read consistently and harmoniously. FCC has previously read "initiate" to be sufficiently broad to encompass the conduct by which a seller sets in motion – such as by offering significant incentives for outside telemarketers to generate sales – a process that results in an outside telemarketer placing a call on the seller's behalf.[1] While DISH's filings in this proceeding contend that certain FCC regulations must be read to use the term "initiate" as physically placing a call, *see, e.g.,* Mar. 31, 2011 Joint Petition of DISH and the United States at 14-15, FCC's formal interpretation of "initiate," not DISH's understanding of that word, controls here. *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997) (agency's interpretation of its own regulations are "controlling" unless plainly erroneous or inconsistent with its own regulations). Moreover, as discussed at length in DOJ's Reply Comments (filed on the public docket on May 19, 2011), the TCPA's use of "initiate" and other terms should be read not in a vacuum, but in context and with a view for their place in the statute's overall statutory scheme. Any questions about the proper interpretation of the statute's language should be resolved in favor of a reading which advances the policies the TCPA was enacted to promote.

Moreover, even if "initiate" is defined to mean "to physically place a call," that reading does not mandate the conclusion that the TCPA cannot hold sellers liable for their outside sales entities' telemarketing violations. The statutory provisions allowing the states and private plaintiffs to sue for TCPA violations do not limit liability to the entity that "initiated" an illegal telemarketing call. The TCPA causes of action are much broader than that: 47 U.S.C. § 227(g) authorizes a State to sue "any person [that] has engaged or is engaging in a pattern or practice of [violative] telephone calls or other transmissions to residents of that State," while 47 U.S.C. § 227(c)(5) allows suit by a consumer on the National DNC Registry "who has received more than one telephone call within any 12-month period by or on behalf of the same entity . . . ."[2] *See also* 47 U.S.C. § 227(b)(3) (consumer right of action for prerecorded calls). DOJ expressed grave concern that reading the TCPA to limit seller liability could substantially limit the private

[1] *See* Brief for the FCC and the United States as *Amicus Curiae*, *Charvat v. Echostar Satellite LLC*, Case No. 09-4525 (6th Cir.) at 9-10 ("[T]he FCC has made clear that a person or entity can be liable for calls made on its behalf even if the entity does not directly place those calls. In those circumstances, the person or entity is properly held to have "initiated" the call within the meaning of the statute and the Commission's regulations) (citing FCC's 1995 Order); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of State Farm Mutual Automobile Insurance Company for Clarification and Declaratory Ruling*, 20 FCC Rcd 13664, 13667 ¶ 7 (2005).

[2] The cramped interpretation of "initiate" advanced by DISH and other commentators would, however, render superfluous the "on behalf of" language in Section 227(c)(5) – because a seller who did not "initiate" a call would not be liable for calls made on its behalf – and also render nonsensical other parts of the TCPA that use "initiate." For example, FCC exempts from the DNC rules non-profit organizations and "independent telemarketers" who place calls on behalf of non-profits, 68 Fed. Reg. 44,144, 44,148 (July 25, 2003). The exemption would be unnecessary if only the independent telemarketer who placed the call faced liability under the statute.

right of action granted to consumers and potentially eviscerate one of the major remedies built into the statute.

The participants also discussed the effect that the primary liability approach would have on businesses that outsource their telemarketing, especially small or mid-sized companies. DOJ stated that the TCPA appropriately requires that *any* business that hires others who may telemarket for it must take effective steps to ensure that the outside telemarketers comply with the law, but noted that the compliance obligations of smaller businesses will be far less than the burden on large, national companies. This is a natural result of the exponentially lower volume of calls that smaller companies make and to the smaller geographic area most serve. DOJ emphasized that TCPA compliance is neither unduly expensive nor unattainable. Many large national companies comply with the telemarketing laws even while engaging outside telemarketers. For example, one large telecommunications provider does so by pre-scrubbing all call lists used by its outside telemarketers.

While the TCPA acknowledges that businesses may properly outsource their telemarketing, the TCPA's primary goal is to help consumers avoid unwanted telemarketing calls by giving them (and the States) the remedy of suing those responsible for TCPA violations. And absolving sellers of liability for illegal calls made by their outside telemarketers would eviscerate consumers' ability to bring private TCPA actions. Most consumers who receive illegal calls know only the identity of the seller on whose behalf the call was made: if consumer suits against sellers alone cannot state a claim sufficient to survive a motion to dismiss, then in most cases, consumers will not file suit at all, and nobody will ever be held liable.

DOJ further observed that imposing primary liability on businesses for their outside telemarketer's calls would be good public policy, because it will place on businesses the proper incentive to engage reputable telemarketers who comply with the law and who have the resources to indemnify the seller if a violation occurs.

2. Agency Law Has No Place in the TCPA

The meeting also addressed whether agency law, particularly the doctrine of apparent authority, should play any role in interpreting the TCPA in this context. DOJ strongly opposed importing agency law principles here. This proceeding provides FCC with the opportunity to use its extensive expertise to interpret the TCPA in the fact-specific context of how the telemarketing industry actually operates, and thereby to provide a measure of certainty and predictability to litigants and courts in TCPA cases.

Agency law developed for the purpose of establishing legal principles to facilitate and encourage persons to act through agents where necessary. Agency concepts, therefore, are designed to *enable* agents to act on behalf of principals and to *encourage* third-parties to rely on those agents' representations as if they were made by the principals. Moreover, agency law principles developed in the context of contract and tort disputes, and are better suited for those contexts than for telemarketing violations. In contract and tort disputes, the victim-plaintiff usually knows or can determine the identity of the purported "agent." In the telemarketing context, this is rarely the case: most telemarketers who violate the telemarketing laws use technology to mask their identities. Therefore, prohibiting all suits against the purported

"principals," and permitting suits only against the purported "agents," would effectively bar all suits.

Although agency law is highly malleable—and therefore appears to be adaptable to the telemarketing context, this malleability is a double-edged sword. In particular, a general application of agency law, without consideration of how it applies in the telemarketing context, creates significant risks of inconsistent adjudication in TCPA cases. This is especially so because agency law is in flux, with multiple – often competing – formulations advanced by litigants and adopted by courts. As in *Charvat v. Echostar Satellite, LLC*, 269 F.R.D. 654 (S.D. Ohio 2010), some courts have applied state agency law to determine whether a seller is liable for violative calls made by its outside telemarketers. Some commentators, such as DISH, favor applying the "federal common law of agency." But that common law developed in contexts (such as ownership of copyright under the Copyright Act and employment law) which are factually far removed from telemarketing. Further, in those contexts, agency law was being applied for a very different purpose, and certainly not one analogous to the primary goal of the TCPA: to protect consumers.

As DOJ noted, the agency law concept closest to what the TCPA demands is that of "apparent authority." Yet even the various Restatements of Agency differ in how they define apparent authority. The Restatement 2d of Agency requires some manifestation by the principal (the seller) to the third-party (the consumer) to imbue the would-be agent with apparent authority. Restatement (Second) of Agency § 27 (1958). The Restatement 3d of Agency's apparent authority definition, by contrast, requires a reasonable belief by the consumer that is "traceable" to some manifestation by the seller that the telemarketer has authority to act on its behalf. Restatement (Third) of Agency § 3.03 (2006). Other terms that arise in an agency context, such as "ratification," have similarly ill-defined requirements that would pose significant obstacles for a TCPA consumer plaintiff.[3] The foregoing brief discussion identifies only some of the unnecessary and counter-productive questions that litigants and courts would be required to resolve were the FCC to incorporate agency law into the TCPA's standard for imposing liability.

In addition to injecting uncertainty into the TCPA liability analysis, using agency law to define the contours of TCPA liability would cause sellers to devote resources to the formalities of their relationships with outside sales entities, rather than to the TCPA compliance of their telemarketers. It would encourage sellers to structure their relationships with outside entities to promote the making of unwanted calls while limiting their liability, and actively discourage sellers from requiring their outside sales entities to comply with the TCPA, thereby permitting unwanted calls to proliferate. In fact, many sellers already seek to avoid liability in this way.

[3] At common law, the concept of ratification requires the principal to have knowledge of all material facts about how the agent exceeded its authority. *See, e.g., American Motorists Ins. Co. v. Keep Services, Inc.*, 881 N.Y.S.2d 477, 479 (N.Y. App. Div. 2009) ("The act of ratification, whether express or implied, must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language.") In a telemarketing context, a TCPA plaintiff would face nearly insurmountable hurdles trying to prove both that the seller knew all material facts relating to an outside telemarketer's historical calls to the plaintiff and that the seller took some affirmative act to "ratify" a telemarketing call that did not result in a sale.

For example, it is well known that sellers subject to complaints arising from calls made by their outside sales entities fail to enforce these entities' compliance with the telemarketing laws, precisely because they believe that exercising such "control" will subject them to liability under an agency law rubric. Such a result undermines the TCPA's purpose by encouraging sellers to hire outside telemarketers, do nothing to enforce TCPA compliance, and then disclaim liability when the telemarketer makes illegal calls – all while reaping the benefits of telemarketing.

In DOJ's view, if FCC adopts a rule that incorporates agency law wholesale, it would miss the chance to use its expertise and deep understanding of the telemarketing industry to guide consumers, enforcement agencies, and industry. Such a path would increase the risk of inconsistent adjudication and perpetuate a system where outside telemarketers violate the TCPA with impunity. This would in turn, likely lead to increased TCPA violations.

3. Rather than Importing an Uncertain and Subjective Agency Law Framework into the TCPA, The FCC Should Craft a Standard for Seller Liability That Addresses the Specific Problems and Situations Found in the Telemarketing Industry

While it is unnecessary and ill-advised for FCC to import agency law into the TCPA, principles from this area of law could certainly inform the FCC's declaratory ruling regarding when the TCPA will hold a seller liable for telemarketing calls made on its behalf by an outside entity. To provide the clearest guidance to industry, consumers, and courts, such liability principles should not refer to agency law, but instead should be defined explicitly in terms of common telemarketing practices.

For example, the meeting participants discussed how FCC could create a liability standard where a plaintiff's complaint alleging that he received an illegal call marketing a seller's goods or services would suffice to plead a TCPA claim against that seller. The defendant seller could rebut this presumption by showing that it did not enter into a relationship with either the caller or any entity doing business with the caller to market its services. The presumption could also be rebutted if the seller shows that it could not have benefited from the illegal telemarketing call. If, however, the plaintiff demonstrates that the seller authorized or could have benefited from the marketing activities of the caller, the seller would be liable.

Examples of the types of telemarketing-specific evidence that would be relevant to an analysis of seller liability for calls by outside entities include:

- Evidence reflecting whether the seller allows the outside sales entity access to information and systems that the seller controls, such as
    - Whether the outside sales entity has the ability to cause the seller to deliver a product or service directly to the consumer;
    - Whether the outside sales entity is authorized to use the seller's trademark and service mark;
    - Whether the outside sales entity possesses detailed information regarding the nature and pricing of the seller's products and services;

- Whether the outside sales entity possesses the seller's customer information;
- Whether the outside sales entity has the ability to access and enter consumer information into the seller's sales or customer systems.

- Evidence reflecting whether the seller is aware that the outside sales entity has used or will use telemarketing to market its products and services, such as
  - Whether the seller is aware of the outside sales entity's ability to telemarket or history of telemarketing;
  - Whether the seller approved, wrote, or reviewed the outside sales entity's telemarketing scripts;
  - Whether the seller has approved or consummated any sales made via telemarketing by the outside sales entity;
  - Whether the seller monitors the outside sales entity's telemarketing calls;
  - Whether, if the outside sales entity was not authorized to telemarket, the seller learned that the entity was telemarketing and allowed it to continue;
  - Whether the seller received complaints that the outside sales entity made illegal calls but took no effective steps to ensure that the seller would not obtain customers through illegal telemarketing

- Evidence reflecting whether the seller has a telemarketing compliance program that effectively prevents telemarketing violations, shown by facts such as
  - Whether the seller authorized an outside sales entity to telemarket or acquiesced to its telemarketing without imposing measures to ensure TCPA compliance;
  - Whether the seller's contract with the outside sales entity gives the seller any right to control the outside sales entity's marketing operations;
  - Whether the seller performed pre-contract due diligence on an outside sales entity in order to evaluate whether the dealer might be a TCPA risk;
  - Whether the seller effectively disciplines, by termination or other penalties, outside sales entities that violate the telemarketing laws.

As shown by the foregoing list of factors, the actual conduct of the parties, rather than the language of a seller's contract with its outside sales entities, would be determinative of liability. In many cases, an outside sales entity's contract bars it from placing illegal telemarketing calls, but the seller's actual conduct shows that the seller knew the outside entity was placing illegal calls and allowed such conduct to continue. Some courts have absolved sellers of liability by relying solely on the written contracts between sellers and telemarketers, without inquiring into the facts surrounding the seller-telemarketer relationship. DOJ's proposed approach would

avoid this absurd result by permitting evidence of the parties' actual conduct to trump any contract language setting forth what the outside sales entity is authorized to do.

Given the risks associated with importing agency law wholesale into the TCPA, DOJ also urged that FCC's standard steer clear of creating pleading or proof elements that could be read as requiring the existence of a formal agency relationship between the seller and the outside sales entity. Examples of such unduly restrictive elements opposed by DOJ include: (1) that the outside sales entity be an employee of the seller; (2) that the seller have consummated the sale with the plaintiff consumer bringing the action; (3) that the seller specifically approve the outside sales entity's use of telemarketing; (4) that the seller know of and/or approve the outside sales entity's specific call to the specific consumer; (5) that the seller have specifically approved the outside sales entity's placing illegal telemarketing calls; (6) that the seller have the right to control how and under what circumstances the outside sales entity engages in telemarketing; (7) that the seller actually control how and under what circumstances the outside sales entity engages in telemarketing; (8) that the seller have communicated with the consumer; or (9) that the seller supply the equipment and information used by the outside sales entity to perform its telemarketing activities. Because sellers assiduously avoid such arrangements so as to avoid liability, and because most consumers are not in a position to prove these elements, making these elements a requirement of a private right of action would essentially strip the TCPA of its private right of action.

DOJ concluded the meeting by reiterating that the primary liability approach is the simplest approach that permits the statute, FCC regulations, and FCC rulings to be read in harmony. DOJ also emphasized again that importing agency law wholesale would be inappropriate, and would likely lead to an increase in TCPA violations and a decrease in effective enforcement. DOJ reiterated that, to the extent that the Commission finds that agency principles have some utility, DOJ would urge that the Commission adopt a rebuttable presumption approach fashioned around factors specific to the telemarketing industry.

DOJ appreciates the opportunity to meet with FCC and to offer this supplemental information.

Regards,

Lisa K. Hsiao

cc: Laurence Bourne
William Freedman
Jacob Lewis
Kurt Schroeder
Sherrese Smith